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No. 77-1248

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE ILLINOIS STATE BOARD OF ELECTIONS,
Defendant-Appellant,

vs.

SOCIALIST WORKERS PARTY, et al.,
Plaintiffs-Appellees.

Consolidated With

THE ILLINOIS STATE BOARD OF ELECTIONS,
Intervening Defendant-Appellant,

vs.

GERALD ROSE, et al., *Plaintiffs-Appellees,*

CHICAGO BOARD OF ELECTION COMMISSIONERS, et al.,
Defendant-Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

MOTION TO AFFIRM IN PART AND DISMISS IN PART

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INTRODUCTION

Appellees Gerald Rose, United States Labor Party, et al., and the Socialist Workers Party, pursuant to Rule 16 of the Rules of this Court, submit this motion to affirm in part and to dismiss in part the appeal brought by appellant Illinois State Board of Elections. If the Court, in the alternative, views appellant's Jurisdictional Statement as a petition for a writ of certiorari, appellees respectfully request that the petition be denied.

QUESTIONS PRESENTED

1. Whether any substantial federal question is presented by appellant's attack on the unanimous decision of the Court of Appeals for the Seventh Circuit which declared unconstitutional under the Equal Protection Clause of the Fourteenth Amendment a state statute which requires significantly larger numerical signature requirements for ballot access for independent or new political party candidates seeking *local* office than the maximum signature requirements permitted by statute for independent and new political party candidates seeking *statewide* office.

2. Whether a decision of the Court of Appeals which does not involve the unconstitutionality of a state statute under the United States Constitution is properly before this Court on direct appeal.

STATEMENT OF THE CASE

Following the death of the Honorable Richard J. Daley, Mayor of the City of Chicago, the Chicago City Council ordered that a Special Mayoral Election be held on June 7, 1977. The Chicago Board of Election Commissioners subsequently issued an election "calendar," granting "independent candidates" until February 19, 1977 to obtain and file the signatures of 35,947 qualified Chicago voters and

granting "new political parties" until April 4, 1977 to obtain and file the signatures of 63,373 voters, in order to secure positions on the ballot in the Special Mayoral Election. These figures purportedly were required by Ill. Rev. Stat., Ch. 46, §§10-2 and 10-3, which establish the minimum signature requirements for independent candidates and new party candidates in local elections as 5% of the entire vote cast in the last succeeding election for the same office being sought.*

Plaintiffs in the cases now consolidated before this Court included an independent candidate, two "new political parties" and their respective supporters. Their complaints challenged both the filing dates and numerical signature requirements imposed by the Chicago Board of Election Commissioners in its calendar. Plaintiffs' complaints alleged *inter alia* that Ill. Rev. Stat., Ch. 46, §§ 10-2 and 10-3 unconstitutionally deprived plaintiffs of the equal protection of the laws because independent and new party candidates running for Mayor of Chicago in 1977 were required to obtain 35,947 or 63,373 signatures, while similarly situated candidates for statewide offices only needed 25,000 signatures. Because the complaints attacked the constitutionality of a state statute, the State Board of Elections intervened as a party defendant.

On February 8, 1977, plaintiffs moved for a preliminary and permanent injunction reducing the signature requirements and extending the filing deadlines for independent candidates and new political parties. While this motion was pending, the Chicago Board of Election Commissioners and the State Board of Elections unilaterally announced that the filing deadline for independent candidates would be extended and that the signature requirement for new

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* The relevant portions of sections 10-2 and 10-3 are set forth in appellant's Jurisdictional Statement at pages 4-5.

political parties would be reduced. Thus, the filing deadline and signature requirements for independent candidates and new party candidates running in the Special Mayoral Election would be the same: April 4, 1977 and 35,947 signatures. This agreement by defendants was reflected in an order of the district court which was entered on February 14, 1977. This order was not objected to, and is not at issue in this appeal.

On March 14, 1977, the district court entered a preliminary and permanent injunction against the enforcement of those portions of Ill. Rev. Stat., Ch. 46, §§10-2 and 10-3 which would require more than 25,000 signatures to be filed by independent candidates and candidates of new political parties in order to secure access to the ballot for the Special Mayoral Election. (App., p. 32.)* The injunction also prohibited the defendants from requiring independent candidates or new political parties to obtain more than 25,000 signatures in subsequent local elections. The court's ruling was based on the fact that Sections 10-2 and 10-3, which establish the 5% formula for local elections, also provide that an independent candidate or new political party seeking ballot access in a *statewide* election must secure only 25,000 signatures.** The court, in an extensive memorandum opinion, found that the disparity in treatment afforded similarly situated persons by the statute was totally unjustifiable and violative of the Equal Protection Clause of the Fourteenth Amendment. (App., pp. 17a-26a.)

Several days later, on March 17, 1977, the court ordered that "solely as applied to the Special Mayoral Election to

*References to "App." are to the appendices attached to appellant's Jurisdictional Statement.

** The populations of the various cities and counties in Illinois are such that the "5%" rule will require more than 25,000 signatures only for elections in the City of Chicago or in Cook County.

be held in Chicago on June 7, 1977," the signature requirement for independent candidates and new political parties would be further reduced to 20,000 signatures and the filing deadline would be extended from April 4 to April 18, 1977. The court's order was pursuant to a stipulation entered into by the plaintiffs and the principal defendant, the Chicago Board of Election Commissioners. The settlement resolved all remaining disputes relating to the Special Mayoral Election and, by its own terms, had no bearing on any future elections.

On December 9, 1977, the Court of Appeals for the Seventh Circuit adopted the reasoning of the district court's memorandum opinion and affirmed the March 14 permanent injunction. The Court of Appeals dismissed the State Board of Elections' appeal from the March 17 order as moot.

I.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN THIS APPEAL BECAUSE THE COURT OF APPEALS' DECISION IN NO WAY CONTRAVENED THIS COURT'S SUMMARY AFFIRMANCE IN JACKSON v. OGILVIE AND MERELY REFLECTED FUNDAMENTAL PRINCIPLES OF EQUAL PROTECTION.

Appellant is soliciting this Court's attention by characterizing the opinion below as contrary to the ruling in *Jackson* v. *Ogilvie,* 325 F. Supp. 864 (N.D. Ill.) (three judge court), *summarily affirmed,* 403 U.S. 925 (1971).

In the *Jackson* case, the plaintiff, who sought ballot access as an independent candidate in a regularly scheduled Chicago mayoral race, alleged that the application of the 5% signature requirement for an independent candidate *as compared to the substantially lower (.5%) signature requirement for Republicans and Democrats seeking nomination to the same office* created a denial of equal protection. The three-judge court disagreed.

In the instant case, plaintiffs argued and demonstrated that the application of the 5% signature requirement for independent candidates and new political parties seeking ballot access in a specially called local election *as compared to a maximum signature requirement of 25,000 for independent and new political party candidates seeking positions on the general election ballot in statewide elections* created a denial of equal protection. The court agreed. (App., p. 26a.)

Plaintiffs in no way challenged the ruling of the court in *Jackson.* Rather, plaintiffs presented a constitutional

attack on the statute that had not been raised or decided by the court in *Jackson.*

Even assuming this Court can accept appellant's proposition that "law of the case" applies in cases filed six years apart with entirely different plaintiffs and defendants, appellant concedes that "law of the case" applies only "to the same issues in subsequent proceedings in the case." (Jurisdictional Statement, page 11.) It is apparent that the issues considered by the court in *Jackson* v. *Ogilvie* were not present or presented in this case. In the case at bar, the district court properly recognized that (App., pp. 35a-36a):

> "Most importantly, the conclusion that the 5% requirement for Chicago mayoral candidates violated the equal protection clause was based upon an argument which was not considered by the *Jackson* court.[4]
>
> [4] This argument was mentioned in passing in a brief by the defendants [sic] but was ignored in both the majority and dissenting opinion in *Jackson.*"

The district court therefore properly concluded that "the decision of *Jackson* v. *Ogilvie* was not binding upon the court in this action, since the plaintiffs raised new factual and legal issues." (App., p. 37a.)

As to the application of the doctrine of *stare decisis,* this Court recently noted in *Mandel* v. *Bradley,* 432 U.S. 173, 176 (1977), that its summary affirmances of lower court decisions have limited precedential value:

> "Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below.
>
> 'When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated

summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument.' (Footnote omitted.) *Fusari* v. *Steinberg*, 419 U.S. 379, 391-392 (1975) (BURGER, C. J., concurring).

"Summary affirmances and dismissals for want of a substantial federal question without doubt reject the *specific challenges presented* in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the *precise issues presented* and necessarily decided by those actions." (emphasis added.)

The district court and the Court of Appeals were not bound by any "law of the case" and in every respect properly applied the principle of *stare decisis* to reach a manifestly correct decision based on fundamental principles of equal protection. No conflict with this Court or other circuits was present. In fact, the court's opinion was in strict conformity with, and relied upon, *Lendall* v. *Jernigan* ("Lendall III"), 424 F. Supp. 951 (W.D. Ark. 1977), in which the district court struck down a statutory scheme which required a state senatorial candidate to file more signatures for ballot access in a district of small population than he would have had to file had he been running for municipal office elected by residents of the entire City of Little Rock. On facts substantially the same as those presented here, this Court summarily affirmed the decision that such a statutory scheme was unconstitutional. 433 U.S. 901 (1977).

The district court's order in this case properly applied fundamental principles of equal protection analysis. There is no rational reason, let alone a compelling state interest, for requiring similarly situated citizens to obtain 65,000

signatures to get on the ballot in a local election where only 25,000 signatures are required for candidates for United States Senator or for Governor or for other offices elected by all voters in the State of Illinois.

Therefore, no substantial federal question remains, and no further argument need be heard. This portion of the appeal should be summarily affirmed.

II.

THE QUESTION OF MOOTNESS IS NOT WITHIN THE JURISDICTION OF THIS COURT ON APPEAL, AND THEREFORE THAT PORTION OF APPELLANT'S APPEAL SHOULD BE DISMISSED.

Appellant attacks the Court of Appeals' decision dismissing on mootness grounds the appellant's claim that the Chicago Board of Election Commissioners was not authorized to agree to a court order establishing signature requirements and a filing deadline other than those set forth in the statutes, "solely as applied to the Special Mayoral Election to be held in Chicago on June 7, 1977." (App., p. 39a.) Appellant claims this issue should not have been considered moot and herein purports to appeal from that portion of the Court of Appeals' decision.

However, this Court's jurisdiction on appeal is limited to those cases in which "a party (relies) on a state statute held by a Court of Appeals to be invalid as repugnant to the Constitution, Treaties or Laws of the United States . . . and the review on appeal shall be restricted to the federal question presented." 28 U.S.C. Sec. 1254. See *United States* v. *Hastings*, 296 U.S. 188, 193 (1935).

The mootness ruling rendered by the Court of Appeals does not involve the constitutional validity of a state statute. Consequently, the issue may not be heard by this

Court on appeal. Presumably, the question could have been raised by a petition for writ of certiorari, and in fact appellant characterizes its Jurisdictional Statement in the alternative "as a writ of certiorari pursuant to 28 U.S.C. Sec. 2103 [sic]." (Jurisdictional Statement, p. 3.) However, appellant has not met the requirements of Rule 23 of the Rules of this Court for a petition for a writ of certiorari.

More significantly, regardless of the procedural manner in which this issue is viewed, the Court of Appeals correctly determined that the issue was moot. The district court's order of March 17, 1977, related exclusively to the filing deadline and signature requirement for the June, 1977 Special Mayoral Election necessitated by the death of Mayor Daley. The facts surrounding the Special Election were peculiar to this case. The likelihood that a similar situation will arise in the future is, at best, slight. Nothing in appellant's Jurisdictional Statement warrants this Court's exercise of its certiorari jurisdiction.

For the reasons noted above, appellant's appeal on the mootness ruling by the Seventh Circuit should be dismissed. In the alternative, this Court should deny the petition for a writ of certiorari.

CONCLUSION

The unanimous decision of the Court of Appeals for the Seventh Circuit, adopting in full the extensive and well-reasoned decision of the district court, was manifestly correct. These decisions were based on (App., pp. 36a-37a):

> ". . . the undisputed points that the defendants had established the signature requirement of 35,947 for the special mayoral election, and that the Illinois election laws require no more than 25,000 signatures for ballot placement in statewide offices. The court ruled that as a matter of law plaintiffs' claims were to be evaluated under the 'strict scrutiny' standard of constitutional review, and that the state had to choose the 'least restrictive alternative' in setting petition requirements designed to further its legitimate purposes. The court could not find any rational reason why a petition with identical signatures could satisfy these state interests in statewide elections, and yet fail to do the same in a lesser political unit, opinion at page 20. The defendant Chicago Board did not advance any rational reason for this greater burden on less-than-statewide candidates, nor are any advanced by the defendant State Board."

This case was a simple one, was correctly decided and should receive no further review by this Court.

Respectfully submitted,

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